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Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, Year 2004

ROOSEVELT IVORY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Whether *Scarborough v. United States*, 431 U.S. 563 (1971), which held that to establish jurisdiction in a firearms case, the government only has to prove that the firearm previously traveled at some time in interstate commerce, should be overruled as inconsistent with the traditional limitations of the Commerce Clause jurisdictional nexus requirements as more recently interpreted by *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Jones v. United States*, 529 U.S. 848 (2000).

LISTING OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Roosevelt Ivory,
Appellant

vs.

United States of America,
Appellee

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REQUIREMENTS AS MORE RECENTLY INTERPRETED BY *UNITED STATES v. LOPEZ*, 514 U.S. 549 (1995); *UNITED STATES v. MORRISON*, 529 U.S. 549 (2000);AND *JONES v. UNITED STATES*, 529 U.S. 848 (2000) 5,6

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(2) *United States v. Roosevelt Ivory*, OPINION, Affirming Defendant's Conviction, No. 2-20165 (6th Cir. July 14, 2004) (unpublished, reproduced in Appendix).

(3) *United States v. Roosevelt Ivory*, ORDER DENYING THE DEFENDANT'S PETITION FOR REHEARING *EN BANC*, No. 03-5447 (6TH Cir. Sept. 30, 2004) (unpublished, reproduced in Appendix).

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Roosevelt Ivory, respectfully prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Sixth Circuit.

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OPINION BELOW

The United States Court of Appeals for the Sixth Circuit filed an opinion on July 10, 2004, affirming the conviction in this case by the United States District Court for the Eastern District of Tennessee at Knoxville. [App. 17]. Petition for rehearing en banc was sought, but was denied on September 30, 2004. [App. 25].

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STATEMENT OF JURISDICTION

Petitioner seeks certiorari review of an Opinion of a United States Court of Appeals. The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article I, Section 8
18 U.S.C. §922(g)

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STATEMENT OF THE CASE

Mr. Ivory respectfully petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit, in which the appellate court upheld his conviction under 18 U.S.C. § 922(g)(1) for knowingly possessing in and affecting commerce a firearm after having been previously convicted of a crime punishable by imprisonment for a term exceeding one year.

Mr. Ivory's case presents a critical question as to the continued constitutional validity of the holding in *Scarborough v. United States*, 431 U.S. 563 (1977) in light of this Court's most recent commerce clause jurisprudence of *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598; and *Jones v. United States*, 529 U.S. 848 (2000). Mr. Ivory suggests that the analytical framework set forth in these later cases undermines the holding of *Scarborough* to an extent that this Court should overrule the decision.

On September 5, 2001, the United States returned a one count indictment against Mr. Ivory for a violation of 18 U.S.C. § 922(g). The district court had jurisdiction over the case pursuant to 18 U.S.C. § 3231.

On September 8, 2000, Mr. Ivory was seized, searched and arrested after officers saw him standing in the courtyard of an apartment complex talking on his cell phone. The search of Mr. Ivory revealed that he was carrying a weapon. The only criminal

charge that resulted from the encounter was one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).[App. 18].

Pursuant to 18 U.S.C. § 922(g), it is unlawful for anyone who has previously been convicted of a crime punishable by imprisonment for a term exceeding one year to knowingly "possess in or affecting commerce" any firearm or ammunition. [App. 28, 29]. Testimony at Mr. Ivory's trial showed only that the firearm had been manufactured outside of Tennessee, and that at some time prior to it having been possessed by Mr. Ivory, it had been sold within the state of Tennessee.

The jury was instructed that, in order to satisfy the element of "in or affecting commerce", the government need only prove that the firearm identified in the indictment traveled across a state boundary at any time. The jury was further instructed that it was not necessary to find that the defendant knew that the firearm had moved in interstate commerce before he possessed it. To preserve the issue for appeal, through counsel, Mr. Ivory objected to the instruction that the government is only required to prove that the firearm crossed a state boundary at any time. The trial court overruled the objection due to existing precedent on the issue.

Mr. Ivory appealed the case to the Sixth Circuit Court of Appeals on four grounds, one of which was a challenge to the judge's instruction regarding the "in or affecting commerce" element of the offense. In an unpublished opinion issued July 14, 2004, the Sixth Circuit rejected Mr. Ivory's Commerce Clause challenge without discussion. [App.21]. The court relied upon its recent decision in *United States v. Loney*, 331 F.3d 516, 524 (6th Cir. 2003), where it found that, under *Scarborough,* 18 U.S.C.

§922(g) represented a valid exercise of Congressional power under the Commerce Clause. [*Id.*] Mr. Ivory's conviction was affirmed. [App. 24]. Mr. Ivory petitioned the court to rehear the case and suggested that it be reheard *en banc*. On September 30, 2004, the court denied both requests. [App. 25]. Mr. Ivory now requests that this Court consider his challenge.

It is respectfully submitted that this Court's holding in *Scarborough v. United States*, 431 U.S. 563 (1977), concerning the proof necessary to establish the requisite nexus between possession and commerce with regard to possession of a firearm cannot be reconciled with this Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598; and *Jones v. United States*, 529 U.S. 848 (2000). Certiorari review should be granted in order to resolve this important question of federal constitutional law.

REASON FOR GRANTING THE WRIT

I. THE HOLDING IN *Scarborough v. United States*, 431 U.S. 532 (1971), THAT TO ESTABLISH JURISDICTION IN A FIREARMS CASE, THE GOVERNMENT ONLY HAS TO PROVE THAT THE FIREARM PREVIOUSLY TRAVELED AT SOME TIME IN INTERSTATE COMMERCE, SHOULD BE OVERRULED AS INCONSISTENT WITH THE TRADITIONAL LIMITATIONS OF THE COMMERCE CLAUSE JURISDICTIONAL NEXUS REQUIREMENTS AS MORE RECENTLY INTERPRETED BY *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Jones v. United States*, 529 U.S. 848 (2000).

This Court should resolve the conflict that exists between the holding in *Scarborough v. United States*, 431 U.S. 532 (1971), and its more recent Commerce Clause jurisprudence. It is respectfully submitted that *Scarborough's* holding regarding the proof necessary to satisfy the required nexus between possession of a firearm and commerce is inconsistent with the later decisions of *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Jones v. United States*, 529 U.S. 848 (2000). Certiorari review should be granted in order to resolve this important question of federal constitutional law.

Mr. Ivory challenges the constitutionality of allowing federal jurisdiction based solely upon the gun having been manufactured outside the state where it was possessed *at some point in the past*. U.S. CONST., ART. I, §8. This constitutional claim challenges the continued validity of the Court's interpretation of the predecessor statute to 18 U.S.C. § 922(g) in

Scarborough v. United States, 431 U.S. 531(1971). There, this Court held that proof that an illegally possessed firearm previously traveled at any time interstate commerce was sufficient to satisfy the nexus between possession of the firearm and commerce. *Id.* at 575.

Mr. Ivory contends that *Scarborough* is an aberration from this Court's historical interpretation of the Commerce Clause, and that were *Scarborough* to be decided today, it could not withstand a Commerce Clause challenge. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court set the stage for re-evaluating Commerce Clause jurisdiction. In that case, the Court struck down the so-called Gun-Free School Zones Act because the statute contained no jurisdictional element which would ensure that possession of a gun in a school zone actually affected interstate commerce. *Id.* at 561. Contrary to *Scarborough's* minimal nexus requirement, *Lopez* determined that the proper jurisdictional test "requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, 514 U.S. at 559.

Just five years later, in *United States v. Morrison*, 529 U.S. 598 (2000), this Court again struck down legislation that ran afoul of Commerce Clause jurisdictional requirements. The Court invalidated the Violence Against Women Act which purported to create a federal cause of action for gender motivated violence. The *Morrison* court focused on the fact that the statute had no express commerce clause jurisdictional element and that gender motivated crime was not economic in nature. *Id.* at 610-13.

That same term, this Court was faced with another commerce clause challenge to a federal statute. In *Jones v. United States*, 529 U.S. 848 (2000), the Court found it necessary to read

the federal arson statute very narrowly only to apply to property actively employed in commerce in order to avoid rendering the statute constitutionally infirm. *Id.* at 857-58. Significantly, the Court held that the statute could not apply to a "passive, passing, **or past** connection" to interstate commerce. *Id.* at 855 (emphasis added). The fact that the Court noted that a past connection would be insufficient to justify legislation under the Commerce Clause contrasts with the older *Scarborough* opinion and renders *Scarborough* constitutionally infirm.

Not only is this issue ripe for the Court's consideration, but Mr. Ivory's case presents a particularly compelling example of the need to reconsider the over federalization caused by *Scarborough.* At Mr. Ivory's trial, an officer testified that a trace of the weapon showed that it was sold at some point by a gun seller in Newport, Tennessee to a man who lived in Newport, Tennessee.(10/22/2002 Trial Transcript [hereafter Tr.], Volume I [V.I] at 104). Thus, the only evidence of a sale of this weapon was within Tennessee. An agent of the Bureau of Alcohol, Tobacco, and Firearms testified, based primarily upon reference materials used by the ATF, that the weapon was manufactured outside of the state of Tennessee. (Tr. V. I at 108). However, the agent had no knowledge of how the weapon got to Tennessee or who originally received it in Tennessee, or even whether the weapon was received as a gift. (Tr. V. I at 111-12). Thus, there was no proof of a connection to interstate commerce.

Over objection, the district court instructed the jury as follows:

> The term "in or affecting commerce" includes commerce between any place in a state and any place outside that state. The government may

> meet its burden of proof on the question of "in or affecting commerce" by proving to you beyond a reasonable doubt that the firearm identified in the indictment traveled across a state boundary at any time.

(Tr. V. II at 90).

Absent reliance on *Scarborough's* standard of proof, Mr. Ivory's conviction under 18 U.S.C. §922(g) cannot stand. At Mr. Ivory's trial, the government offered no evidence to suggest that Mr. Ivory's temporary possession of a gun did or could have substantially affected commerce as required by *Lopez, Morrison,* and *Jones.* Mr. Ivory's conviction rests on a **past** connection with interstate commerce, which was specifically rejected by the *Jones* Court.

Following *Lopez*, this Court has recognized that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001). Mr. Ivory respectfully suggests under the commerce clause analysis presented by *Lopez* and its progeny, mere proof that a firearm traveled in interstate commerce at some time in the past cannot sustain a conviction under 18 U.S.C. §922(g). To allow §922(g) to reach so broadly exceeds Congress's power under the Commerce Clause.

While lower courts have suggested that the *Scarborough* standard of proof is insufficient to establish the required nexus between commerce and possession of a firearm, see, e.g., *United States v. Kuban*, 94 F.3d 971 (5th Cir. 1996); *United States v. Coward*, 151 F. Supp. 2d 544 (E.D. Pa. 2001), all that have considered the issue have determined that only this Court is at

liberty to address the constitutional infirmity of *Scarborough* by overruling the decision.

CONCLUSION

For the above reasons, Mr. Ivory respectfully prays that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY _____DEP. CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No.: 3:01-CR-140
	)	
ROOSEVELT IVORY	)	

MEMORANDUM AND ORDER

This criminal case is before the court on the defendant's motion for a judgment of acquittal or for a new trial [doc.40]. The government responded to the defendant's motion over seventy-five days after the motion was filed, but only after the court ordered the government to file a response [doc.44]. Following a trial, a jury found the defendant guilty of the one-count indictment charging a violation of 18 U.S.C. § 922(g)(1). For the reasons discussed below the defendant's motion will be denied.

A. Taint of the Jury

The first issue the court will address is the defendant's motion for a new trial based on the fact that a juror was excused after deliberations had begun. During voir dire, juror Tate asked to approach the bench and expressed so me fears that this case was related to a drug case that was tried almost ten years ago and involved some defendants from Florida. Mr. Ivory is from Florida. Mr. Tate told the court that he knew all about the "Florida Boys Gang" and he was concerned that this trial might be related. The court assured Mr. Tate that this case was unrelated, and Mr. Tate was not challenged by either side.

About three hours after the jury began to deliberate, the court received a note from the foreperson of the jury which stated:

> Due to circumstances, we have juror who cannot make a decision yes or no. The juror feels the decision would complicate daily life environment due to personal conflict with parties involved. The juror wishes to withdraw from the panel.

The court correctly surmised that the juror with the problem was Mr. Tate. Defense counsel asked the court to send a note back to the jury reminding them that they had a duty to deliberate and they should do their best to reach a verdict. The court, relying upon Rule 23(b) of the Federal Rules of Criminal Procedure, found instead that there was just cause to excuse the juror. Defense counsel then asked that the alternate be recalled to participate in deliberations. The government agreed with this procedure. The court addressed the jury in open court and asked the jurors if they were aware of the note sent by the foreperson.

The jurors indicated that the note was read to them before being submitted to the court. The foreperson told the court that the juror could not make up his mind about the case either way, and the court excused Mr. Tate from further deliberations. After the jurors left the courtroom, defense counsel asked the court ton inquire whether Mr. Tate said anything that would have "infected" the jury with extraneous information. The court declined to do so.

The next morning, defense counsel asked the court to inquire of each juror whether any extraneous information, especially about the Florida Boys, was brought to their attention by Mr. Tate. Once again the court denied the defendant's request, and then the jurors, including the alternate, were instructed to deliberate anew.

In his motion for a new trial, the defendant argues that the court erred in excusing Mr. Tate and in refusing to inquire of Mr. Tate and the other jurors about any extraneous information that might have come to the jury's attention. After reviewing the relevant case law on the issues raised by the defendant, especially *United States v. Davis*, 177 F.3d 552 (6th Cir. 1999), the court determined that it had a duty to investigate the circumstances that led to excusing Mr. Tate from the jury panel. The court asked Mr. Tate and the foreperson of the jury to return for the limited purpose of determining whether Mr. Tate said anything to the other jurors about his reasons for wishing to withdraw that could be considered an extraneous influence. The government vigorously objected to this procedure arguing that such a procedure was "highly disfavored" [doc.46].

On February 10, 2003, a hearing was held in open court with counsel for the government and the defendant and his counsel

present. Mr. Tate was sworn in, and in response to counsel's questions, he told the court that he did not say anything to the other jurors until deliberations began. At that time he told the jurors that he "knew some of the people"; that he lived in the same apartment complex (Green Hills) where the defendant was arrested; that he was afraid and was not going to jeopardize his life; and that he just could not come to a verdict. A vote was taken and he voted not guilty. Sometime after that, the note was prepared and sent to the court.[1]

The foreperson was also sworn in, and he explained that when the jury went back to the jury room after being charged, the jury considered the evidence for awhile and then a "blind" vote was taken. There was one "not guilty" vote. He said that Mr. Tate came to him after the vote and told him that although he had voted "not guilty," he really agreed with all the other jurors that the defendant was guilty. Mr. Tate said that he was uncomfortable and he wanted off the jury so he would not have to vote. Mr. Tate said, "You don't understand the situation I'm in." The foreperson brought the matter up with the rest of the jurors and they composed the note sent to the court. The foreperson did not recall Mr. Tate saying anything to the other jurors other than the fact that he lived in Green Hills and he might have known a girlfriend or relative of one of the witnesses. The foreperson recalled that, as they were leaving after Mr. Tate had been excused, Mr. Tate told him that he knew about a person named "Tiko" and that he had been banned

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[1]Mr. Tate also testified that numerous votes were taken and he always voted "not guilty," but this testimony directly conflicts with the recollection of the foreperson, whose testimony the court credits as accurate.

from the Green Hills complex. The foreperson volunteered that his judgment would not have been influenced whether Mr. Tate had been on the jury or not.

At the close of the hearing, in light of the testimony of Mr. Tate and the foreperson, the court decided that it was unnecessary to recall the remaining jurors. After the hearing, the parties were allowed to brief the issues raised by the defendant in his motion for a new trial in light of the testimony adduced at the hearing [docs. 56 and 58].

The defendant's first issue is that it was error to dismiss Mr. Tate based on the note sent to the court from the jury room. Rule 23(b) of the Federal Rules of Criminal Procedure provides that "if the court finds it necessary to excuse for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." The decision by the court that there is "just cause" to excuse a juror after deliberations have begun is within the scope of the court's discretion. *See United States v. Ramos*, 861 F.2d 461, 466 (6th Cir. 1988). In this case, the court remains of the opinion that there was just cause to excuse Mr. Tate. The note clearly indicated that there was a juror who could or would not make a decision because it "would complicate daily life environment due to personal conflict with parties involved." The juror wanted to withdraw from the panel. After inquiring about the accuracy of the note's contents, the court was satisfied that the best course was to excuse Mr. Tate and proceed with eleven jurors or recall the alternate.

The court notes that the circumstances of this case are very similar to those in *United States v. Davis*, 177 F.3d 552 (6th Cir. 1999). In *Davis*, after the evidence had been presented, a juror sent

a note to the judge asking to be excused from service explaining that he lived in the area where the defendants' allegedly trafficked in crack cocaine, and his used car business was located in an area of town populated by minority residents like the defendants. The juror stated that he was afraid for his own safety and that of his business if he participated in the jury verdict. He sated that his fear was prompted by information he had received form one of his employees that members of the community were discussing his service on the jury. *Id.* At 556. The court evidently took no action at that time. After the jury was charged, the juror stood up in open court and again requested that he be excused from deliberations. After hearing from the juror in chambers, the court excused the juror. *Id.* The Sixth Circuit implicitly agreed with the trial court's decision to excuse the juror while finding that the trial court should have made further inquiry about the effect of the juror's statements on the other jurors. *Id.* at 557.

This court recognizes that excusing a juror during deliberations is an unusual circumstance, but given the information available to the court that there was a juror who could or would not deliberate, the court remains convinced that excusing Mr. Tate was the best course of action at the time.

The next issue then is whether extraneous information was brought into the jury room that might have influenced the jury's deliberations. In his brief, the defendant argues that Mr. Tate's fear and his discussion with the foreperson about "Tiko" was prejudicial extraneous information justifying a new trial. The Sixth Circuit defines extraneous influence as information "derived from specific knowledge about or a relationship with either the parties

or their witnesses." *United States v. Herndon*, 156 F.3d 629, 636 (6th Cir. 1998).

Before considering the merits of the defendant's arguments, the court will address the government's vigorous objection to the procedure decided on by this court. The government agreed that the court correctly dismissed Mr. Tate but objected to any inquiry of Mr. Tate or any other juror about the circumstances that led up to Mr. Tate being excused.

The United States Supreme Court holds that where there are credible allegations that extraneous information has infected the jury deliberations, the trial court must "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Remmer v. United States*, 347 U.S. 227, 230, 74 S.Ct. 450, 451-52, 98 L.Ed. 654 (1954). Hearings held under these circumstances have come to be known as *Remmer* hearings.

In *Davis*, the Sixth Circuit held that a *Remmer* hearing must be held to give the defendant an opportunity to establish actual bias where a colorable claim of extraneous influence has been raised. *Davis*, 177 F.3d at 557. "At that hearing, the defendant bears the burden of proving actual juror bias, and no presumption of prejudice arises merely form the fact that improper contact occurred." *Id.* In *Davis*, even though the district court has questioned the juror about his communications with his employee and about his fears of participating in the deliberations, the Sixth Circuit remanded the case to the district court for a *Remmer* hearing. *Id.* The court stated" "Without the benefit of a hearing delving into the extent to which [the juror's] comments affected

the other jurors' deliberations, neither the district court nor this court has any basis for concluding that the extraneous communications were harmless...." *Id.* On remand, the district court held a hearing and inquired of each juror whether the excused juror's comments influenced their decision one way or the other. The district court determined that the defendant has not carried his burden of demonstrating actual juror bias and denied the defendant's motion for a new trial. *United States v. Davis*, 2001 WL 1070209 (6th Cir. Sept. 5, 2001).

In its objection, the government attempted to distinguish *Davis* by arguing that the district court in *Davis* knew that the juror's fear was based on retaliation, knew that the information that prompted the fear came from the juror's employee, and knew that a number of jurors openly agreed with the juror's predicament. Given this information, the government maintained it was reasonable to require the district court to have a *Remmer* hearing. The government argued, however, that this court did not have that kind of information, and a *Remmer* hearing was uncalled for.

This court disagrees with the government's argument. It was precisely because this court did not have the information known to the court in *Davis* that this court decided to invite Mr. Tate and the foreperson back for a limited inquiry about the circumstances that led Mr. Tate to request to be excused. Based on the arguments raised by the defendant in his motion for new trial, this court believed that it had a duty to make the limited inquiry to determine if a full *Remmer* hearing was necessary, especially in light of Mr. Tate's concerns that this case might have been related to the infamous Florida Boys case. *See United States v. Herndon*, 156 F.3d 629, 637 (6th Cir. 1998) (the district court has a duty to

investigate a claim of extraneous influence and conduct a *Remmer* hearing). Thus, the court finds that the government's objection was not well-taken.

Based on the testimony of Mr. Tate and the foreperson, this court finds that a further *Remmer* hearing is not necessary, and the defendant's motion for a new trial on this issue must be denied. *Davis*, at 557 ("a new trial will not be necessary every time a question of jury partiality is raised"). Other than the foreperson, it is does not appear that Mr. Tate discussed his fears with anyone else on the jury. All the other jurors were told was that Mr. Tate wanted off the jury because he could not vote yes or no. Further, Mr. Tate's comments to the foreperson about Tiko were not made in the presence of the other jurors, and the foreperson volunteered that he was not influenced by the presence or absence of Mr. Tate in the jury room. The only other statements Mr. Tate may have made in the jury room related to the fact that he lived in the Green Hills apartments where the defendant was arrested and that he might know the girlfriend or relative of one of the witnesses. The court finds that these statements do not rise to the level of information that would have an extraneous influence on the other jurors. Thus, an additional inquiry of *Remmer* hearing unnecessary.

B. <u>Motion to Suppress Evidence</u>

The defendant asks the court to revisit its ruling on his motion to suppress evidence, however, the defendant does not point to any trial testimony which would alter the court's opinion that the motion to suppress the evidence should be denied. Therefore, this issue is overruled.

C. Sufficiency of the Evidence

The defendant first contends that the government failed to introduce sufficient proof to show that he was a convicted felon because the documents establishing this element do not contain a formal judgment of conviction. The government introduced certified records from South Carolina showing that on November 17, 1993, the defendant was indicted for distribution of crack cocaine. On July 25, 1994, the defendant appeared and pled guilty to the charge, and he was sentenced to six years in prison, suspended with probation for two years. The plea document is signed by the defendant, and the sentencing document is signed by the presiding judge. At the close of the government's proof, the defendant made a motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure arguing that the government had failed to establish one of the elements of the offense, that is, the government had failed to establish that the defendant was a convicted felon. The court overruled the defendant's motion based on the Supreme Court's opinion in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983).[2]

In *Dickerson*, there was no formal judgment upon a verdict or upon a court's specific finding of guilt after a bench trial. The Court had documents showing a plea to the charge and the defendant's sentence of probation. *Id.* at 111, 103 S.Ct. at 991.

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[2]The court recognizes the remainder of the holding in the *Dickerson* case was abrogated by Congress when it amended the definition of "conviction" and exempted expunged convictions and required that convictions be defined by state law, not federal. However, it appears that the Court's holding concerning the need for a formal judgment of conviction is still good law.

The Supreme Court found that under 18 U.S.C. § 922(g), the term "convicted" does not apply only to one against whom a formal judgment has been entered. *Id.* at 112, n.6, 103 S.Ct. At 991, n. 6. The Court stated, "It is also plain that one cannot be placed on probation if the court does not deem him to be guilty of a crime. . . ." *Id.* at 113-14, 103 S.Ct. at 922. The court held: "[F]or purposes of the federal gun control laws, we equate a plea of guilty and its notation by the state court, followed by a sentence of probation, with being "convicted" within the language of §§ 922(g) and (h)." *Id.* at 114, 103 S.Ct. at 992. The Sixth Circuit adopted this holding in *Flippins v. United States*, 807 F.2d 16, 18 (6th Cir.), *cert. denied*, 481 U.S. 1056 (1987), stating: "The Supreme Court has determined that a guilty plea, followed by a sentence of probation, is enough to constitute a 'conviction' for purposes of the federal gun control statutes."

Second, the defendant argues that the South Carolina documents were not sufficient to prove the defendant's identity. At trial, however, the defendant testified that he was convicted of the South Carolina offense and placed on probation. Thus, the evidence of the defendant's connection with the South Carolina conviction was established by the defendant's own testimony.

Finally, the defendant argues that the evidence was insufficient on the interstate commerce element. The defendant suggests that *Scarborough v. United States*, 431 U.S. 563, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977) is no longer good law in light of recent Supreme Court cases. This court, however, is bound by the rule in *Scarborough*, and proof that a firearm previously traveled in interstate commerce is sufficient to satisfy the interstate commerce nexus.

The court finds that the government's evidence was sufficient on the issue of the defendant's convicted felon status, his identity, and the interstate commerce nexus. The defendant's attack on the sufficiency of the evidence must fail, and he is not entitled to a judgment of acquittal.

D. Evidentiary Errors

The defendant argues that the court erred in admitting proof of his possession of over $4000 in currency. He claims that the probative value of such evidence was substantially outweighed by the unfair prejudice. The court disagrees. The defendant's possession of cash helped explain the circumstances surrounding his arrest and was relevant evidence. The court finds that the defendant was not unduly prejudiced by the admission of this evidence.

The defendant also contends that evidence that the officers were investigating the possibility of criminal activity when they encountered the defendant should not have been admitted. The court finds that the whole encounter with the defendant would not have made sense to the jury if the reason for the officers' investigation was not explained. Furthermore, the only reference to the reason for the officers' investigation was brief, and the matter was not discussed again.

The court finds that there were no errors in the admission of evidence and the defendant's motion for a new trial on these issues must be denied.

E. Jury Instructions

First, the defendant contends that the court erred in refusing to charge the jury on his temporary innocent possession theory. The defendant requested and the court charged the jury on the defendant's theory of necessity, but declined to also charge the jury on the defendant's temporary innocent possession theory. The court finds under the facts of this case that the necessity charge given by the court adequately presented the defendant's defenses to the jury. The requested temporary innocent possession charge was not necessary or even proper in light of the facts of this case.

Second, the defendant argues that the court erred in instructing the jury that the South Carolina offense to which the defendant pled guilty was in fact a felony. The court's instruction stated:

> The term "crime punishable by imprisonment for a term exceeding one year" generally means a crime that is a felony. It does not include any state offense classified by the laws of the state as a misdemeanor. I hereby instruct you that the crime of distribution of cocaine is a crime in the state of South Carolina punishable by imprisonment for a term exceeding one year as that phrase is used in these instructions.

This is a correct statement of the law. The defendant has not cited any case law supporting his position that this instruction was error.

The court finds that the defendant's complaints about the court's instructions to the jury must be overruled.

F. Miranda Violation

The defendant's last argument is that certain statements were elicited from him in violation of his *Miranda* rights, and those statements were used against him at trial. Several of the statements were merely identifying statements such as his name, his Florida residence, and his birth date. The defendant explained the cash as related to his occupation as a "banker" or as an employee of a mortgage company. These statements were not proof of any of the elements of being a felon in possession of a firearm, although defense counsel used these statements to explain the possession of the cash during his closing argument. To the extent that the statements were admitted in violation of the defendant's *Miranda* rights, the court finds that it was harmless.

CONCLUSION

Therefore, for the reasons discussed above, it is hereby **ORDERED** that the defendant's motion for a judgment of acquittal or for a new trial [doc. 48] is **OVERRULED**.

ENTER:

/S/ Leon Jordan
Leon Jordan
United States District Judge

FILED
JUL 14 2004
LEONARD GREEN, CLERK
NOT RECOMMENDED FOR PUBLICATION

NO. 03-5447

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	) ON APPEAL
	) FROM THE UNITED
	) STATES DISTRICT
	) COURT FOR
	)THE EASTERN
	) DISTRICT OF
ROOSEVELT IVORY,	) TENNESSEE
	)
Defendant-Appellant.	)

Before: SILER and GIBBONS, Circuit Judges;
REEVES, District Judge.[3]

SILER, Circuit Judge. Roosevelt Ivory appeals his conviction on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He raises various issues, including the constitutionality of his *Terry* stop. We affirm.

BACKGROUND

Ivory was spotted at night by two police officers in a remote, high-crime courtyard of the Green Hills apartment complex in Knoxville, Tennessee. Fearing that Ivory was a

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[3]The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

"peeping Tom" or burglar, the officers decided to investigate and made their way to Ivory's location. By this time, Ivory had moved further down the building, away from the window, and was talking on his cellular telephone. After Ivory told the officers that he neither lived in the Green Hills Apartments nor knew anyone who lived there, they asked that Ivory turn around so that they could make sure that he was not armed and that he had not dropped anything on the ground around his location. When Ivory complied, one of the officers detected the outline of a gun along Ivory's waistband. He then frisked Ivory and discovered a loaded pistol.

Ivory was indicted and tried on one count of being a felon in possession of a firearm. His defense was that the gun was not his, that it belonged to a person named "Tiko," and that Ivory had discovered the gun minutes earlier in the seat cushion of a couch in one of the apartments and had confiscated the weapon so as to prevent children from mishandling it. (Ivory testified that he had been in the apartment of a friend of a friend.) The jury was instructed on the defense of necessity, and Ivory was convicted.

Ivory asserts four alleged errors on appeals: (10 the district court's finding that the police's investigatory (*"Terry"*) stop of Ivory was supported by reasonable suspicion, (2) an instruction to the jury that the interstate commerce element of the charged offense could be satisfied simply by showing that the gun at issue at some point crossed state lines, (3) a failure to instruct on the defense of temporary innocent possession, and (4) excusing Juror Tate after the jury had begun deliberations. We find these asserted errors to be without merit.

STANDARD OF REVIEW

"[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de nono* on appeal," *Ornelas v. United States*, 517 U.S. 692, 699 (1996), though "[h]aving said this, . . . a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* Ivory's Commerce Clause challenge amounts to a constitutional assault on 18 U.S.C. § 922(g)(1), and is therefore a question of law reviewed *de novo*. *United States v. Loney*, 331 F.3d 516, 524 (6th Cir. 2003). "A district court's refusal to give a specifically requested jury instruction is reviewed for abuse of discretion," *United States v. Alvarez*, 266 F.3d 587, 591 (6th Cir. 2001), as is district court's decision to excuse a juror after deliberations have begun and its finding that the dismissed juror had not infected the jury by injecting prejudicial extraneous information. *See United States v. Ramos*, 861 F.2d 461, 466 (6th Cir. 1988); *see also United States v. Davis*, 177 F.3d 552, 557 (6th Cir. 1999).

DISCUSSION

A. Whether Ivory's Seizure was Supported By Reasonable Suspicion

Determining whether Ivory's seizure was permissible requires a two-step analysis.

> First, [the court] determine[s] whether there was a proper basis for the stop, which is judged by examining whether the law enforcement officials were aware of specific and articulable facts which gave rise to a reasonable suspicion. Second, [the

> court] decide[s] whether the degree of intrusion into the suspect's personal security was reasonably related in scope fo the situation at hand, which is judged by examining the reasonableness of the officials' conduct given their suspicions and the surrounding circumstances.

United States v. Garza 10 F.3d 1241, 1245 (6th Cir. 1993) (quotations and citations omitted).

On the first step fo the analysis, Ivory's detention by the officers was appropriate. The officers had "specific and articulable facts" leading them to believe that Ivory "had[d] been or [was] about to be involved in criminal activity." *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 12 (1989)).

As to the second step of the analysis, the scope of the intrusion into Ivory's personal security was not improper. *Terry* itself made clear that

> where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot that the person[] with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial states of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled . . . to conduct a carefully limited search of the outer

> clothing of such persons in an attempt to uncover weapons which might be used to assault him.

Terry v. Ohio, 392 U.S. 1, 30 (1968). The facts of *Terry* are very much akin to those here.

In the instant case, the totality of the circumstances indicates that the officers' seizure of Ivory was supported by reasonable suspicion. The detainment and frisk was therefore proper under *Terry*.

B. The Commerce Clause Issue

Ivory's Commerce Clause challenge to the statute under which he was convicted fails because the argument Ivory advances in support of his challenge has recently been rejected by this court. *See United States v. Loney*, 331 F.3d 516, 524 (6th Cir. 2003).

C. The Court's Refusal to Instruct on the Defense of "Temporary Innocent Possession"

> The court will reverse an appellant's conviction for failure to give a requested jury instruction only when: "(1) the requested instruction is a correct statement of the law; (2) the requested instruction is not substantially covered by other delivered instructions; and (3) the failure to give the instruction impairs the defendant's theory of the case." *United States v. Chesney*, 86 F.3d 564, 573 (6th Cir. 1996) (citing *United States v. Carr*, 5 F.3d 986, 992 (6th Cir. 1993)).

United States v. Alvarez, 266 F.3d 587, 594 (6th Cir. 2001).

Applying the criteria as set forth in *Alvarez*, the temporary innocent possession instruction requested by Ivory was a correct

statement of the law. *See United States v. Wolak*, 923 F.2d 1193, 1198 (6th Cir. 1991) (noting that the Sixth Circuit has recognized that such a defense exists, albeit only in "rare situation"). Nonetheless, because the district court instructed on the defense of necessity, the temporary innocent possession defense was substantially covered by another instruction. Also, the failure to give the temporary innocent possession instruction in no way impaired the defendant's theory of the case, which was that he had possessed the firearm to keep it out of the hands of children.

Instructing on necessity but not temporary innocent possession fairly and adequately submitted the issues and applicable law to the jury. It was not an abuse of discretion to decline to instruct on this rare defense, and if it was, any error was harmless. *See id.* (opining that "the trial judge would have been better advised to give an instruction on the innocent possession theory" but finding any error to be harmless).

D. Dismissal of Juror Tate

Tate was excused from the jury after a note was sent to the judge indicating that he could not make a decision in the case because "the decision would complicate daily life environment due to personal conflict with parties involved" and that he wishes to withdraw from the jury. The record does not support the intimation, first articulated at the post-trial hearing, that Tate's excusal had anything to do with the merits of the case. This reason for excusal does not mesh with the reason given by Tate at trial, just after the note was written and under questioning by the trial court. Given the discrepancy between Tate's trial and post-trial hearing testimony, the district court cannot be faulted for crediting jury foreman Killough's account over Tate's. Moreover, even

taking Tate's testimony at face value, Tate's familiarity with the case's location and players would seem to have not simply justified, but *required* his excusal. Given these obvious conflicts, we cannot conclude that the district court abused its discretion when it granted Tate's request – articulated through Killough's note – to be removed from the jury.

Nor did the district court abuse its discretion in finding that Tate did not relay any prejudicial extraneous information. The only thing he said to the other jurors as a group was that he had heard of Tiko. Whle it is true that Tate also told Killough privately that Tiko had been barred from the Green Hills apartments, Killough did not share this information with the rest of the jurors. Nor did he consider the information in weighing the evidence himself. Moreover, even if Killough had shared with other jurors the information about Tiko's being barred from the complex, it is unclear whether such information would help or hurt Ivory. Because it was Ivory's burden to show actual prejudice, *see United States v. Corrado*, 304 F.3d 593, 603 (6th Cir. 2002), the district court did not abuse its discretion in declining Ivory's request for a new trial.

AFFIRMED.

FILED
SEP 30 2004
LEONARD GREEN, CLERK

NO. 03-5447

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
ROOSEVELT IVORY,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: SILER and GIBBONS, Circuit Judges; and REEVES,[4] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

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[4] Hon. Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

Leonard Green, Clerk

UNITED STATES CONSTITUTION

ARTICLE I

Section 8. Powers of Congress

The Congress shall have Power

. . .

3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

18 UNITED STATES CODE § 922 (g)

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such

intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) **(i)** includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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